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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Petition not printed

No. 152

FRANK CANIZIO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, NEW YORK

BRIEF ON BEHALF OF THE PETITIONER

MAURICE EDELBAUM,
Counsel for Petitioner.

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Orfield, Writ of Error Coram Nobis, 11 Neb. L. Bull. 421	12
Freedman, Writ of Error Coram Nobis, 3 Temple Law Quarterly. 365	12
Gordon, Certiorari and the Revival of Error in Fact, 1926, 42 L. Q. Rev. 521	12
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Roscoe Pound, The Administration of Justice in the Modern City, 26 Harv. L. Rev. 302, 319	34
Roscoe Pound, Criminal Justice in America, 1930, p. 186	35
Glueck, Criminal Careers Retrospect, 1943, 5, 6	35
Glueck, Crime and Justice, 1936, 35, 65, 241	35
Dwight McCarthy, Mental Defectives and the Criminal Law, 1929, 14 Iowa L. Rev. 401, 416	35
Stearns, Medical and Social Factors in Crime, 1943, 18 Ind. L. Jour. 283, 288	35
Cohen and Griswald, New York Times, August 2, 1942, IV, 5, 6	39
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 152

FRANK CANIZIO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents

BRIEF IN BEHALF OF PETITIONER

This is a writ of certiorari to the County Court of Kings County, State of New York, which denied petitioner's motion made in a proceeding analogous to common law *coram vobis* or *coram nobis* denying the petitioner the right to be heard on issues of fact where it was alleged in a verified petition (R. 7) that on or about June 19, 1931, he was denied his constitutional right to the assistance of counsel in the County Court of Kings County when that court rendered against him a judgment imposing a sentence of from fifteen (15) to thirty (30) years in state prison for the crime of robbery in the first degree (R. 7).

The order denying petitioner's motion in the Kings County Court was made and entered on April 13, 1945, by the Clerk of that court. The motion was denied by Sobel, C. J. (R. 1).

Petitioner filed his petition for certiorari to this Court on June 22, 1945, accompanying this by a motion for leave to proceed herein in *forma pauperis* (R. 20). On October 8, 1945, this Court granted the motion for leave to proceed in *forma pauperis* (R. 20) and on the same day it granted the petition for the writ of certiorari to the County Court of Kings County.

Opinion Below

The County Court of Kings County rendered no opinion upon the denial of the motion made in that court. Its order simply reciting that: (R. 1).

> "* * * on motion of William O'Dwyer, District Attorney of Kings County,
>
> Ordered, that the said motion be and the same hereby is in all respects denied."

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, providing for a review by the Supreme Court by Certiorari of a final judgment or decree of the highest court of a State, in any cause where any title, right, or privilege or immunity is especially set up or claimed under the Constitution of the United States. The order of the County Court of Kings County in this action is a Court of the last resort or the highest Court of the State in which a decision could be had as there is no statutory authority for an appeal from such a final order to any higher State Court. (*People* v. *Gersewitz*, 294 N. Y. 163.)

Questions Presented

The questions presented by this writ of certiorari are whether the motion made by the petitioner in the Kings County Court stated a cause of action based on the denial of a title, right, privilege or immunity guaranteed to petitioner by the Constitution of the United States, and whether the County Court of Kings County should have denied the petition without an opportunity to be heard on the merits (R. 1).

Whether the County Court of Kings County on the 1st day of June, 1931, denied petitioner due process of law when it ordered entered against him a plea of guilty to the crime of robbery in the first degree without his consent or consultation; without informing him of the nature of the charges against him; without the advice of counsel; without assigning counsel or without informing him of the consequences of such a plea of guilty.

Whether the County Court of Kings County on the 19th day of June, 1931, in imposing on petitioner a sentence of fifteen (15) to thirty (30) years, without the assistance of counsel or the effective assistance of counsel deprived the petitioner of his liberty without due process of law.

All in violation of the Constitution of the United States.

Statement

On May 25, 1931, the petitioner was indicted by the Grand Jury for the County of Kings for the crime of robbery in the first degree, Grand Larency in the second degree and Assault in the second degree. The indictment contained three counts all based on the same set of facts (R. 2). On that same day he was arraigned without counsel and pleaded not guilty to the indictment (R. 2). On June 1, 1931, he was again brought to Court (R. 9, 10, 11). He was again without counsel, he was not informed of his right

to counsel nor was counsel assigned by the Court. On this arraignment the petitioner was asked but one question:

"The Court: This is indictment No. 3465-b against Frank Canizio, Patsy Guariglia, and Tony Bruno. They are indicted for robbery in the first degree, grand larceney in the second degree, and assault in the second degree in that on May 22nd, 1931, they robbed one Joseph Grosshandler of a taxicab valued at $500, armed with a gun. Canizio, how old are you?

Canizio: Nineteen, Your Honor" (R. 9).

He was not asked if he wanted to plead guilty or not guilty and stand trial or if he needed a lawyer. The Court after a short discussion with the Assistant District Attorney ordered the clerk to enter a plea of guilty to the crime of robbery in the first degree against petitioner (R. 11).

The petitioner being in absolute ignorance of all Court procedure believed this manner of procedure was legal. He was a nineteen year old boy without any parents, without any education, without money or friends who might help him and without counsel to tell him different. He believed having no money to employ an attorney he must do without one. He had never before been convicted of any crime.

On June 19, 1931, he was arraigned for sentence. He was again in the same miserable predicament and still without counsel, nor did the Court assign him counsel. He was sentenced to a term of imprisonment of fifteen (15) to thirty (30) years in state prison as the result of the plea ordered entered by the court for the crime of robbery in the first degree.

All the records of the Kings County Court are available and the above recitals appear from them and the fair infer-

ences and reasonable intendments to be drawn from them and which this court must judicially notice are as follows:

That the petitioner was a nineteen year old infant at the time and subject to all the legal disabilities and incompetency that attach to an infant.

That no counsel would have permitted the court to enter a plea of guilty to the crime of robbery in the first degree against petitioner without his consent or consultation.

That petitioner, without the aid of counsel, could not have known the elements required under the laws of the State of New York to constitute the crime of robbery in the first degree, or the defenses thereto, or of the complex and intricate distinctions between robbery in the first degree, robbery in the second degree, robbery in the third degree or the various degrees of grand larceny.

That petitioner was under the circumstances unable to form an intelligent judgment without the advice of counsel. That under the conditions prevailing he could not know that the entry of a plea of guilty to the crime of robbery without his consent or consultation was in palpable violation of all the fundamental principles of constitutional law and justice.

That petitioner under the circumstance and conditions prevailing is not presumed to know he was entitled to a trial by jury on the facts alleged in the indictment and must be found guilty beyond a reasonable doubt.

That prosecuting attorneys are on many occasions in cases such as this, sometimes overly zealous to obtain convictions. That being the criterion by which their efficiency is determined.

That petitioner, having been confined in state prison ever since, and being without funds to obtain legal advice and his ignorance of his right to counsel precludes any waiver

of the constitutional right; that he was inacapable adequately of making his own defense or bringing suit to enforce his rights as he was an ignorant boy with no knowledge of the law. He was a pauper infant and unable to employ counsel.

That petitioner may well have only now, through another inmate, discovered the fact that he had a right to the effective assistance of counsel at every stage of the proceedings, that he had a right to a trial by jury and that none other than himself, with the proper aid of competent counsel, may be authorized to plead guilty for him in any criminal proceeding.

That all the aggravated and other denials of the many statutory and constitutional rights in this case stem directly or indirectly from the denial of the constitutional right to the assistance of counsel at all stages of the criminal proceedings in this case.

ARGUMENT

Point First

For purposes of Review in this Court under Section 237 of the Judicial Code, the final order of the County Court of Kings County denying the petitioner's motion without a hearing, not reviewable in any other State Court, is a decision by the highest court of the State in which a decision could be had.

In *Whitman* v. *Wilson*, 318 U. S. 688, this Court held in an interpretation of *Lyons* v. *Goldstein*, 290 N. Y. 19, as follows:

> "After oral argument in this court, the Court of Appeals on March 4th, 1943, decided the case of Lyons v. Goldstein, 290 N. Y. 19. It was there held that despite the lapse of time, a state court in which the judgment of conviction has been entered, retained jurisdiction,

analogous to the common law jurisdiction upon writ of error coram nobis; * * * The opinion rests in part on the requirement of the Due Process Clause that a prisoner be granted a hearing on the merits of such a contention."

If, then, it is recognized the remedy by a proceeding *coram nobis* exists in this state, it must also be held that all the characteristics incidental to the writ are also recognized, especially the finality attributed to the order in such a proceeding, more so when they are not abolished, limited or abrogated by statute. Another of these characteristics is, that an application for such a writ is not a proceeding incidental to a criminal prosecution, but by the English common law a writ of error *coram nobis* or *coram vobis*, being a special form of a writ of error, commenced an entirely new proceeding (Bauvier, Law Dict. (Rawle's rev.) "Writ of Error"; 2 Tidd. 1134, 1141; *Jaques* v. *Ceaser*, 2 Saund. 100). The aggrieved party "purchased" an original writ (*Rex* v. *Davis*, 1 Burr. 638), and he could employ a new attorney without the consent of the Court, which under the rules then existing was a sure mark of a separate suit (*Batchelor* v. *Ellis*, 7 Term Rep. 337; 2 Tidd. 1141).

The averments by this petitioner in the motion to the County Court of Kings County were to the effect that the judgment procured against him was in palpable violation of his constitutional rights. He commenced this proceeding with the object of establishing that fact, because in establishing such fact it must be held that such judgment is void. No more appropriate mode of procedure could be invoked; in fact it was for a proposition of a like nature that the writ of *coram nobis* existed. In the words of Justice Doerfler in *Ernst* v. *State*, 181 Wis. 155, 193 N. W. 978 (1923), "serving the purpose of protecting certain fundamental and inalienable rights with respect to life,

liberty and property and affording pursuant to the maxim of the common law, a remedy wherever there is a wrong." The petitioner alleged that he was in fact denied his constitutional right to the assistance of counsel. If this fact is disputed then he should be permitted to establish it in such a proceeding. "It follows that the allegations of fact in the petition are sufficient to make out a prima facie case of violation of these constitutional rights of the petitioner, sufficient to invoke corrective process in some court, and in the federal district court if none is afforded by the state" *White* v. *Regan*, No. 212, October Term, 1944. And it has been established by the Court of Appeals of this state that such a corrective process is recognized in this state by a writ of error *coram vobis* or *coram nobis*: *Lyons* v. *Goldstein, supra; Whitman* v. *Wilson, supra;* Matter of *Morhaus* v. *Supreme Court*, 293 N. Y. 131. The latter case is a prohibition against habeas corpus. The affidavit in response to petitioner's motion raised the issue of fact, he states that (R. 3):

> "I have spoken to Mr. Rudolph Gross who appears to have been the clerk in the part on June 1, 1931, when the plea of guilty was taken, and Mr. Gross states that to the best of his recollection it was not his procedure when a case appeared on the trial calendar for trial, but where a defendant withdrew a previous plea of not guilty, and wished to plead guilty, to advise the defendant of his right to counsel. However, this does not foreclose the possibility that the trial court itself thus advised the defendant or that he had been so advised at the time of arraignment."

Then again Mr. Seigel in his affidavit continues to beat his retreat from responsibility by further vague possibilities that might have existed (R. 3). He avers:

> "It is possible that during that time records which formerly existed have disappeared."

It is hard to comprehend what records he could have reference to. All the records in the case, including the official stenographic minutes giving a verbatim and intelligible account of the proceedings had of June 1st, 1931 are intact and available. However unreasonable and absurd these possibilities put forward by the respondent are, they are nevertheless an attempt to controvert the affidavit of the petitioner on the original motion and raise a question of fact on which the petitioner should have been heard. To deny him a hearing in person was to deny him due process of law. The mode of procedure he invoked was such as is recognized by the highest court in the state, and has been held by this court as the proper mode where issues of fact are to be determined. The Kings County Court is a court of competent jurisdiction, and may not, by its denial to hear petitioner convert the constitutional right of petitioner into a matter of discretion. This principal is recognized by the Court of Appeals in *Lyons* v. *Goldstein*, *supra:*

> "Although the Constitution contains no description of those processes which it was intended to allow or forbid, it was not left for the legislative power to enact any processes which might be devised. Den. ex. dem. Murray v. Hoboken Land and Improvement Co., 18 How. 272, 15 L. Ed. 372."

And the procedure invoked here was further clarified in the same case; that this "power was exercised in criminal cases at common law through the writ of error coram nobis," *Robinson* v. *Johnson*, 118 F. (2d) 998; *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16.

However, notwithstanding the recognition of the existence of this common law remedy there is no appeal in this state from the order denying such a motion. The right to appeal is strictly a statutory right and according to the

law laid down by the Court of Appeals in the State of New York there is no statutory authority for an appeal from the order denying petitioner's motion by the Court of Kings County. In *People* v. *Gerscwitz* (1945), 294 N. Y. 163, the Chief Justice writing for the court on that occasion said:

> "Perhaps the omission of the legislature to provide for an appeal from an order denying a motion to vacate a judgment of conviction should not be construed as an intentional denial to an aggrieved defendant of a right to appeal. Arguments not without force may be made that when the legislature in Section 517 of the Code of Criminal procedure enumerated 'in what cases appeal may be taken by defendant' is intended to cover only the field in which the courts exercised authority established by statute without considering whether this remained an undefined field in which the courts might exercise 'inherent' authority not established by statute. In a long line of cases this court has consistently applied the principle that the Code of Criminal Procedure 'establishes the practice in all criminal cases and authority for the orders and judgments of the courts' within the field where the legislature may grant authority to a court or may withhold it (People ex rel. Hirschberg v. Orange Co. Ct., 271 N. Y. 151, 153). The court nonetheless recognized, at the same time, that courts have always asserted and exercised authority which though perhaps not expressly established by statute, is 'based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution. It is a power,' the Court said, 'which neither the Legislature can curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional,' People v. Glen, 173 N. Y. 395, 400). We have sanctioned the exercise of such a power by a court to correct its own records or to set aside an order or judgment which was induced by

> fraud or procured in violation of a constitutional right of a party. * * * We held that a motion to vacate a judgment procured in violation of the defendant's constitutional rights is the corrective judicial process which is authorized by the law of the state to remedy the alleged wrong to the defendant, and that it adequately meets the requirements of 'Due Process.' The problem now presented is whether the appellate court may entertain an appeal from an order of the court in which the conviction was had denying the motion to vacate the conviction, though the Code of Criminal Procedure does not provide for an appeal from an order in a criminal action or proceeding except where the order is made pursuant to practice and authority established by statute."

However, it was then and there decided in the *Gersewitz* case that there was no appeal from the order. The error of the interpretation of the common law by the Court of Appeals would seem to be in a misunderstanding of the ancient writ of error *coram vobis* or *coram nobis*. But as that court's interpretation is final in the matter we must abide by it. The writ of error *coram nobis* is not a proceeding incidental to the criminal proceeding, it is a new proceeding. It is the commencement of a new action. Under the common law the order in such a proceeding was a final order and while the writ of error *coram nobis* came into existence as an "original" writ in the sense that it was a writ by which a new proceeding was commenced, so likewise did the writ of *scire facias* and the writ of mandamus, but these writs, like the writ of error *coram nobis* have been employed many times as auxiliary to the jurisdiction of a court in a pending suit, *Winder* v. *Caldwell*, 14 How. 434, 14 L. Ed. 487; *Ewing* v. *United States*, 6 Cir., 240 F. 241; *Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60; *Pickett's Heirs* v. *Legerwood*, 7 Pet. 147, 8 L. Ed. 638; *United States* v. *Steese*, 3rd Cir., 144 F. (2d) 439. See also, Orfield, "Writ

of Error Coram Nobis," 20 Va. L. Rev. 423; 10 Neb. L. Bull. 314; 11 id. 421; Freedman, "The Writ of Error Coram Nobis," 3 Temple L. Quart. 365; Gordon, "Certiorari and the Revival of Error in Fact" (1926), 42 L. Q. Rev. 521; Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931), 47 L. Q. Rev. 557.

In *Wiley* v. *United States* (1944), 144 F. (2d) 708, in discussing the finality of such an order the Court said:

> "The District Court has the jurisdiction of the issue tendered by the motion, even if the motion be deemed to be made after the extended period of the term of court. Holiday v. Johnson, 313 U. S. 342, 249, 350, 61 S. Ct. 1015, 85 L. Ed. 1392. The court's decision in a proceeding in the nature of coram nobis is a final order and hence appealable here. Cf. Robinson v. Johnson, 9 Cir., 118 F. (2d) 998, 1000."

From all the most eminent authorities on the subject it must be conceded that the order of the Kings County Court denying the petitioner's motion was a final order as that court had "jurisdiction of the issue tendered by the motion." The fact that the statutes of this state afford no appeal from such a final order does not detract one whit from its force of finality as far as this court is concerned. To contend to the contrary would be to base the jurisdiction of the Supreme Court of the United States in the discretion of state legislatures. The order of the Kings County Court was a final disposition of the issues presented in the petition of the proceeding instituted. In the light of the decisions of the highest court of this state the proceeding was proper and petitioner has not "misconceived the mode by which his constitutional claim may properly be brought before the New York courts," as stated by respondent in page 8 of his brief in opposition to the granting of the writ.

The order being a final order and for purposes of review in this court it is a decision of the highest court in the State

of New York in which a decision could be had. That problem has been settled in this court on more than one occasion. In *Betts* v. *Brady* (1942), the case so strongly relied on by the respondent in his original brief to this court, this court said when confronted with the non-appealability of an order of a judge of the State of Maryland:

> "In view of what has been said of the power of Judge Bond as a judicial tribunal to hear and finally decide the cause, and of the judicial quality of his action, we are of the opinion that his judgment was that of a court within the intendment of Sec. 237.
>
> "Did the judgment entered comply with the requirement of Sec. 237 that it must be a final judgment rendered by the highest court in which a decision could be had? Again answer must be made in the light of the applicable law of Maryland. The judgment was final in the sense that an order of a Maryland judge in a habeas corpus case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable (see note 7). It is true that the order was not final, and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successfully to one judge after another without exhausting his right. (See note 8). We think these circumstances does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the same sense that it is not subject to review by any other court of the state, we may, in our discretion, refuse the writ when there is a higher court of the state to which another petition for the relief sought could be addressed (See note 6), but this is not such a case. To hold that, since successive applications to courts and judges of Maryland may be made as of right, the judgment in any case is not final, would be to deny all recourse to this court in such a case.

> "Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had on the issue joined in the instant petition we have jurisdiction to review it."

To the same effect is *Jamison* v. *Texas* (1943), 318 U. S. 413, also *Tenner* v. *Dullea* (1941), 314 U. S. 692, and in *Largent* v. *Texas* (1943), 318 U. S. 418 it was said:

> "The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and not one in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant." (Citing cases.)

The petitioner submits, that if the contentions of the respondent in his brief which he submitted in opposition to the granting of the writ that only from the judgment of conviction could a review by this Court be had are made again should be dismissed as frivolous and have no merit. To sustain his argument would be to hold and limit the jurisdiction of this Court in all other proceedings merely by the omission of State Legislatures to provide the right to appeal from such orders. The only reasonable conclusion that can be arrived at after an examination of all the authorities on the subject is that:

1. The order of the Kings County Court was a final order disposing of the issue tendered by the motion, and

2. Judge Sobel's order was a final disposition by the highest court of New York in which a decision could be had on the issues joined.

POINT SECOND

The petitioner was entitled to a full and complete hearing on his allegations that he was denied his constitutional right to counsel in the criminal action had against him in the Kings County Court where he was charged with the crime of robbery and thereafter sentenced to a maximum term of imprisonment for thirty years. The assistance of counsel, in the circumstances there was guaranteed by the due process clause of the Fourteenth Amendment.

In the light of the decisions of this Court (*Johnson* v. *Zerbst*, 304 U. S. 458); The Federal Circuit Court (*Evans* v. *Rives*, 126 F. (2d) 633); the New York Court of Appeals (*People* v. *McLaughlin*, 291 N. Y. 480); the New York Appellate Division of the Supreme Court (*People ex rel. Mooke* v. *Hunt*, 258 App. Div. 24); Supreme Court, Washington County (*People ex rel. Harrison* v. *Wilson*, 29 N. Y. S. (2) 809); and the County Court of Kings County (*People* v. *Sedlak*, 53 N. Y. S. (2) 51), the vague possibilities pointed out by the answering affidavit of the respondent district attorney that petitioner waived his right to counsel are not only absurd but border on misrepresentation and oppression. All the records that would have been part of the judgment roll in an appeal from the judgment of conviction are still available. Not one whit of them have been destroyed. They show a verbatim account of all the proceedings had at the time. In the absence of these records the respondent might have a weak chance to indulge in his contention of the rule of presumption, but their existence forecloses all that. Moreover, it would be ridiculous to conclude that an ignorant 19-year old boy defendant knew of his constitutional right to counsel, or that he intelligently and competently waived it with full knowledge of the terrible predicament he was in, when half the judges and lawyers in both Federal and State courts did not recognize the

principle later enunciated in *Johnson* v. *Zerbst*, 304 U. S. 458, and the decisions which stem from it and *Powell* v. *Alabama*, 287 U. S. 45, both of which were decided *after* the conviction of this petitioner. This Court in *Rice* v. *Olson*, No. 391, October Term, 1944, decided April 23, 1945, restated that principle with even greater force when Mr. Justice Black in writing the opinion for the court said:

> "Whatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. This denial of waiver squarely raised a question of fact. That State Supreme Court resolved this disputed fact by drawing a conclusive implication from the petitioner's plea of guilty. This is the equivalent of a holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offence of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandably waive counsel (Williams v. Kaiser, 323 U. S. 471; Tompkins v. Missouri, 323 U. S. 458; House v. Mayo, No. 921, decided February 5, 1945). Whether all these conditions exist is a matter which must be determined by evidence where the facts are in dispute."

The records in the case of petitioner disclose a violation of his rights guaranteed by the national and state constitutions of a much greater aggravation than in any of the cases cited above. It could not be even inferred in his case that his guilty plea was an indication that the right to counsel was competently and intelligently waived. *He was not even accorded the right of pleading guilty or not guilty.* All that was done for him without even his consent or con-

sultation. These are not vague possibilities or frivolous presumptions. They are positive facts corroborated by the certified records of the Kings County Court. At one time if the record on appeal failed to disclose even a plea of not guilty on arraignment the subsequent judgment would be invalid. (*Crain* v. *United States*, 162 U. S. 625; *Elick* v. *Wash. Terr.* 1 Wash. T. 138; *State* v. *Walton*, 50 Or. 142). It would still be invalid if the absence of a plea of not guilty to the indictment affected any substantial right of a defendant (*Garland* v. *Washington*, 232 U. S. 642). How much more is the violation aggravated when the record so clearly shows no personal plea of guilty whatever but an order of the court to the clerk to enter such a plea, no counsel to advise an ignorant 19-year old boy, never before convicted of crime and consigned to rot in a dungeon for thirty years in violation of all the constitutional and natural laws of justice and fair play. It was stated by the respondent that the petitioner knew of his rights to counsel and based his assertion on the fact that because of a prior arrest for juvenile delinquency the petitioner knew of the constitutional right. That question was expressly answered by Justice Johnson in *United States ex rel. Nortner* v. *Hiatt*, 33 F. Supp. 545 when he said:

> "Personal rights and liberties assured by our constitution are to be jealously guarded, and this court does not agree * * * that a waiver of these rights should be implied. The only way by which a defendant can waive such rights is by a competent and intelligent waiver when acting in full knowledge of his rights and constitutional guarantees. In determining whether he has waived his rights to counsel the particular facts and circumstances of each case will control, including the background, experience and conduct of the accused. Johnson v. Zerbst, 304 U. S. 458. *As a juvenile the relator was twice in custody of a Court, but the circumstances of this case, together with the evidence and the state of the record show nothing indicative of a com-*

petent and intelligent waiver of the relator's right to the assistance of counsel. The relator is entitled to be released upon the writ of habeas corpus sued out in this court." (Italics petitioner's)

And the controlling decisions of this state lay down the same principle. In *People ex rel. Moore v. Hunt*, 258 App. Div. 24, the court said:

> "It is true that relator had once been convicted of a crime. It is true that his testimony here contains no statement that he was in fact ignorant of his right to counsel. It may be said that it should therefore be presumed that he did in fact know of his right to counsel. This, however, is the very presumption which the law says may not be indulged, when it prescribes that a defendant accused of crime must be informed of his right to counsel at all stages of the proceedings. Also it must be remembered that defendant was a layman brought before the County Court immediately after his indictment and that the court and its surroundings were new to him at least in so far as this charge was concerned."

Is it suggested that petitioner must have known the various judicial constructions given to the statutes concerning the various degrees of robbery in this state, and that he was capable of applying them in his own defense? Did his arrest for juvenile delinquency give him such qualifications? Indeed, even if the petitioner had been a man of good education, and had experience in Court procedure, it is submitted that he would be incapable of presenting an adequate defense to a charge of robbery in the first degree in the State of New York. But we have the facts that petitioner had none of these characteristics or abilities, on the contrary, he was a nineteen-year old penniless boy, without parents, without friends, with no education. To him the New York statutes were a sealed book, and even were such a book unsealed to him he could not have read it with comprehension. No pre-

sumption can be sustained that such a defendant knows of his constitutional right to counsel. On this problem the court in *Evans* v. *Rives*, 126 F. (2) 633, said very clearly that:

> "*There is no more basis for such a presumption than for one that a defendant understands the rules governing the sufficiency of indictments, the admissability of evidence, and the burden of proof, or other rules of substantive and adjective law*, and the existence of such a presumption is negatived by the statement of the Supreme Court in Johnson v. Zerbst, that * * * 'The purpose of the Constitutional guaranty of right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights.'" (Italics petitioner's)

Under the judicial interpretations of the Constitution of this State, Article 1, section 6 and the Legislative mandates made in pursuance of the Constitution it is well settled, that where an accused appears alone on his arraignment without counsel, he must be asked if he desires counsel. It is not the function of the accused to see that the right is accorded him, because, as stated above, he is not presumed to know he is enfitled to the benefit of counsel. The Legislature has seen fit to enact positive statutes placing such a duty on the judicial officer before whom he is arraigned to so advise him. (New York Code of Criminal Procedure, Sections 8, 188, 308, 309.) It cannot be said that one arraigned may waive the mandatory duties imposed by law upon a court. To so permit would mean that the duties of courts were dependant upon the action of arrested persons, rather than upon the action of the Legislature. In such a case, the statutory requirements might be readily nullified merely by obtaining from the arrested person a so-called waiver. This would require again consideration of whether the waiver was voluntarily made and "competently and intelligently" entered into. It can be reasonably presumed

that when a person appears in court on a criminal charge (where he is subject to imprisonment for thirty years on conviction), without counsel, that he is either too poor to employ counsel or that he does not know he is entitled to counsel. It is in the recognition of such realisms that the Legislature has enacted the statutes cited above. They all place an affirmative and positive duty on a court to see that a defendant is accorded his constitutional rights. The highest court in this State has laid down the law on the subject. In *People* v. *McLaughlin*, 291 N. Y. 480 it was said:

> "Not only must this primary right be protected, *but there must be a record of all the proceedings that have a bearing thereon*, so that intelligent review may be had. *The record before us does not show adequate protection of this defendant's rights*, and so his conviction cannot stand." (Italics petitioner's)

To presume that this petitioner waived his right to counsel would be to erect one presumption on another. First, it would have to be presumed he knew of this constitutional right to counsel; second, to again presume he waived the right. Such is not now the law, nor has it ever been the law, because the law has never allowed one presumption to be erected on another, nor one inference on another inference. Section 308 of the New York Code of Criminal Procedure provides in part as follows:

> "If the defendant appears for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel * * *."

On arraignment the defendant *must* be asked if he desires counsel and the court *must* assign counsel. These mandatory duties cannot be avoided nor can it be said they have been carried out on the basis of vague possibilities that the court did its duty. It is absurd to do so in the circumstances in

this case. In fact in the face of all the evidence to the contrary it is a rank evasion from responsibility. Recent actions brought in the Kings County Court indicate there are many affected by violations of the same nature but because such violations have been the invariable practice of that particular court does not validate the judgments one whit. Must we vindicate the German war criminals in their brutal and murderous actions on human beings because of the fact the slaughters were of a wholesale nature? And for the same reason must we continue or permit to be continued their incarceration of prisoners and other unfortunate human beings (who had the courage to cry for liberty) in violation of all the principles of fundamental justice? Certainly not. Here we have an American, who as a boy of 19 years of age has been imprisoned for fourteen years in rank violation of all the Constitutions and Magna Chartas that have ever been devised by men who loved and fought for justice. Yea, who extorted these principles from Kings. Here we have a State Prosecutor advocating by a resort to the worst type of Jesuitical Casuistry that he be denied a hearing on the matter; that there is a possibility "etc, etc." In *Wendell* v. *Lavin*, 246 N. Y. 115, 158 N. E. 42, the Court of Appeals of this State in its opinion said:

> "This question must be answered, irrespective of the action of the public authorities for the last quarter of a century, and without in any way questioning their good faith * * *. Nevertheless neither practice nor intentions can modify the express provisions of the Constitution. Sometimes the interpretation of a doubtful and obscure clause in an act of the legislature, or in a constitution, may be aided by the practice which has grown up under it; but plain and clear provisions of a constitution require no such aid. They are to be brought to life and enforced, early or late, and must not be smothered by the accumulation of custom or violations."

The Federal and State Constitutions deal with fundamental principles and the courts should not strain for distinctions so that the simple provisions of the Constitution can be evaded or that any partisan prosecutor may be enabled to beat his retreat from his sworn responsibilities to uphold the Constitution. The highest court in this state had no hestitation in declaring Section 222 of the New York Code of Criminal Procedure unconstitutional when it violated these principles in waiver of an indictment of a grand jury (*People ex rel. Battiste* v. *Christian*, 249 N. Y. 314, 164 N. E. 111). Nor was there any hestitation in affirming the case of *People ex rel. Kearney* v. *Blue*, 44 N. Y. S. (2) 691 in a declaration that Section 400 of the same code was also unconstitutional. Both these statutes created a procedure that did violence to procedural standards laid down in the Constitution. Does the procedure of the Kings County Court on the arraignment of this petitioner as disclosed by the certified records of that court measure up to the procedural standards as guaranteed by the Constitution, where on June 1st, 1931 he was brought into that court and arbitrarily pleaded guilty to the crime of robbery in the first degree without even asking him if he were guilty or not, without even asking him if he wanted to withdraw his prior plea of not guilty and without the advice and effective assistance of competent counsel? Is such a trial by due process of law? In *Chambers* v. *Florida*, 309 U. S. 227, Mr. Justice Black when speaking about the procedural standards guaranteed by the Constitution said:

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—had led few to doubt that it was intended *to guarantee procedural standards*

adequate and appropriate, then and thereafter, to protect, at all times, people charged with crimes by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or the helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. . . . But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the law of the land evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment, for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty' wrote into its basic law the requirements among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow *if procedural safeguards have been obeyed.*" (Emphasis petitioner's.)

The statutes of New York are adequate and appropriate but to conform with the Constitution these 'procedural safeguards' must be obeyed. Their mandates must be obeyed by those on whom the duty is imposed and the record must show that fact. The right to be informed of the constitutional right to counsel and the effective assistance of counsel in a criminal prosecution is no mere formality. The proposition is too serious to permit those who have disregarded the statutes to later seek sanctuary in such doctrine as waiver or estoppel. All the rights written into the Constitution and statutes are as nothing if a defendant is without counsel when charged with a serious crime. The right to have the assistance of counsel, including the appointment of counsel when a defendant is unable to ob-

tain counsel, is the key which unlocks the door to all the other rights of the accused. In fact it is one fundamental right without which all the other rights become valueless, because they are unknown to the accused, or far beyond his powers to apply to his case or to even understand at all. Without counsel he may be deprived of all the other rights guaranteed him by the Constitution and laws of the state, or by the due process clause of the federal constitution, because he, especially in a case as the one at bar, is totally ignorant of their existence, or through sheer fear of asserting them against an overpowering or unscrupulous prosecuting attorney whose only ambition is to pile up a percentage of convictions greater than his predecessor. Without counsel, totally ignorant of his rights, this petitioner was induced to permit a court to order a plea of guilty entered against him on June 1st, 1931 to the infamous crime of robbery in the first degree, an offense which in various states is of a capital nature, and for which he was given a maximum term of imprisonment of thirty (30) years and could have been sent to prison under the laws then existing for his natural life. The decisions of this court in recent years disclose many instances of the loss of substantial rights by indigent defendants solely because they were not represented by competent counsel. In how many of these cases could the right have been effectively asserted, at the time or thereafter, by a defendant without the aid of counsel? In how many other instances does the accused, because of his ignorance, still without counsel, remain in the penitentiary without knowledge of his rights? Then when he does find out that he was convicted in violation of his constitutional rights only to be confronted by the prosecutor with the contention that he cannot have relief as there is a presumption based on the vague possibility he was accorded his rights, even in the face of the records of the county Court to the contrary. Even presumptions

created by statute have no such credible force (*Tot v. United States*, 63 S. Ct. 1241; Whigmore on Evidence, 3rd Ed., Sec. 2491, Vol. IX, p. 289; 20 Am. Jur. 170, Evidence, Sec. 166).

It is submitted, that even if the records of the Kings County Court showed a waiver of the right to counsel, it would still be a denial of the constitutional right to counsel as under the circumstances prevailing there could be no such intelligent and competent waiver as required by the law. An ignorant 19 year old boy without parents, penniless and friendless, charged with a crime of robbery in the first degree could not be deemed to have sufficient discretion to waive such a fundamental right. Why, such a boy is still in his infancy; he could not competently sign a ten dollar promissory note; he is precluded by his very incompetency to enter into a contract; but it is urged by the respondent he may consign himself to imprisonment for his natural life. But the records of the Kings County Court show no such waiver, they do however disclose every word spoken by the Court and the prosecutor, the entire discussion was between them as the defendant took no part in the proceedings, and no amount of ingenuity can read into this record anything that never existed. Justice Major in speaking of the rule of waiver in *United States v. Haupt, et al.*, 136 F. (2) 661, said:

> "It is argued by the government that the burden rested upon the defendants to establish that they did not competently and intelligently sign waivers of custody. The following cases were cited in support of this contention (cases cited). These cases all involve habeas corpus proceedings wherein the petitioners were seeking release from the penitentiary *because they waived a jury trial or the assistance of counsel.* The cases were decided, * * * on the theory *that the record of the court of conviction, showing such waiver*, was presumptively correct and that the burden

to *overcome the record* was on the one who asserted its invalidity. Here we have a different situation. * * * We think under such circumstances the burden was on the government to maintain its assertion. In Johnson v. Zerbst, 304 U. S. 458, 464, * * * the court said: "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." Irrespective, however, as to which side carried the burden, *we must hold there is no satisfactory proof that the defendants knowingly waived any right and no proof as to the waivers signed by the defendants* * * *." (Emphasis petitioner's.)

Cooley, in his Constitutional Limitations, 8th Ed., page 371 says that "In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only."

Now, the records of the proceedings had against the petitioner in the Kings County Court are at this time all available and the statement of Mr. Siegel in his affidavit in answer to the original petition to the Kings County Court that "It is possible that during that time records which formerly existed have disappeared," is a gross misstatement. But these records reveal no waiver of either a trial by jury or of the assistance of counsel both which the constitution of this state guarantee. They disclose the fact that a 19 year old boy was brought into court and the clerk ordered to plead him guilty to the crime of robbery in the first degree. It is urged that this could not have happened if the petitioner had the advice of counsel. *The denial of counsel was the efficient cause for the denial of all the other rights including the right to be tried by jury.*

Point Third

The background of this petitioner which included ignorance, poverty, bewilderment, together with the legal disabilities and incompetency that attach to an infant when charged with a serious crime, subject on conviction to imprisonment for his natural life, preclude a competent and intelligent waiver of the constitutional right to the assistance of counsel on his arraignment in the County Court of Kings County on June 1st, 1931.

Before any right can be waived the person must know of its existence. "A waiver may be defined as the intentional relinquishment of a known right with both knowledge of its existence and the intention to relinquish it" (*Watkins* v. *Fly*, 136 F. (2) 578). In this consideration we deal with the circumstances, background, competency and intelligence of this petitioner at the time of his arraignment on June 1st, 1931 when the court ordered entered against him a plea of guilty to the crime of robbery in the first degree. Now, assuming, *arguendo*, as the respondent says in his brief, that the record did reveal a waiver it would have to be decided was that a competent and intelligent waiver. How that would be determined, and the factors relied on to arrive at the determination has been well settled by the courts. In *Johnson* v. *Zerbst*, 304 U. S. 458, at page 464 in respect to waiver it was said:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right of counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

The background of this petitioner at the time of his arraignment in the Kings County Court on June 1st, 1931,

conspicuously reveals an ignorant boy of 19 years old without parents, poverty-stricken, friendless, incompetent, together with all the disabilities that legally attach to an infant in court actions. Such a background forecloses any reasonable argument contending that he "competently and intelligently" waived his right to counsel. In *Glasser* v. *United States*, 315 U. S. 60, Mr. Justice Murphy in writing the opinion for the court said:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights * * *. Glasser never affirmatively waived the objection he initially advanced when the trial court suggested the appointment of Stewart. We are told that since Glasser was an experienced attorney he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objections at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to the consideration of his right to the protection of the Sixth Amendment. *His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel.* * * * But it is by no means conclusive." Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused, Mr. Justice Sutherland said that such a duty "is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and *with a caution increasing in degree as the offences dealt with increase in gravity.*" Patton v. United States, 281 U. S. 276. The trial court should protect the right of an accused to have the assistance of counsel." (Emphasis petitioner's.)

We may at this moment indulge in a glance at the background of Glasser. He was an attorney, a former United

States Attorney for the Northern District of Illinois. Well educated in the history of jurisprudence and experienced in all modes of court procedure in criminal actions; well informed in both his statutory and constitutional rights and as to the gravity of the offence of which he was charged, a glance at the punishment imposed determines that factor. He was sentenced to imprisonment for fourteen (14) months. Notwithstanding these factors the court said:

> "We indulge every reasonable presumption against waiver of fundamental rights."

For comparison let us glance at the situation of the petitioner in the instant case and observe the gulf between him and Glasser. An ignorant 19-year-old boy. Without friends or parents to offer him help or advice; without money and without counsel. An infant under the laws of every State in the Union and subject to all the legal disabilities and incompetency accorded by the law of a minor. Even a minor named as a codefendant, but for whom no guardian ad litem was appointed, could not be subject to an adverse judgment in a civil suit. (*Grego v. Demanio*, 231 N. Y. S. 130). A deed attempting to convey property of infants pursuant to a court order, without proper notice and without appointment of guardian ad litem would be void; and an infant may repudiate an entire contract because he is deemed by the law *incompetent* to make one (*Anthony v. Syracuse University*, 224 A. D. 487). While it is here conceded that the rights of infants rate no superiority over those of adults, while the latter must in most cases protect their own rights, the rights of infants are of greater concern to the court because of their *incompetency*. He cannot be sued in civil actions to establish titles without appointment of guardian ad litem. He is not considered to have sufficient discretion to adequately enforce and protect his rights, and hence he is prohibited from prosecuting or defending his

civil suits alone. A court would acquire no jurisdiction over him, a defendant, where summons, though personally served on him, was not served on the parent. (*Ward* v. *Ward*, 242 N. Y. S. 171.) Only when he becomes of age may he be entitled to the control and management of his defense in a civil suit, and even there he may be "allowed to appear and defend in person and with counsel" (Const. of New York, Art. 1, sec. 6). It is not suggested that infancy is a defense for the commission of a crime, but merely to illustrate that minority of itself shows *incompetency*. All the foregoing disabilities attached this petitioner when he made his appearance on arraignment in the Kings County Court in the instant case, and the situation was further aggravated to his disadvantage by the fact that he was penniless. As to the gravity of the offence of which he was charged: he was subject to life imprisonment. Surely it cannot be contended with reason that under such circumstances he was capable of "competently and intelligently" dispensing with the most sacred of fundamental rights, a right even now scrupulously accorded the Geramn war criminals, the right to the "Assistance of Counsel," or that the presumption exists that infants brought up in ignorance known of its existence and must demand it in a criminal prosecution. Is it demanded of such a minor that he inherently possesses the degree of perfection which Kipling, in his "If," set forth as some of the necessary attributes of a man, when he said:

"If you can keep your head when all about you
Are losing theirs and blaming it on you:
If you can trust yourself when all men doubt you,
But make allowance for their doubting, too,

* * * * * * *

"If you can bear to hear the truth you've spoken,
Twisted * * * to make a trap for fools,

* * * * * * *

"If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you,

* * * * * * *

* * * You'll be a man, my son."

We know this Court does not think so, all their decisions are to the contrary. In the days of the tyrant there may have been precedents against us but those days are gone forever. Mr. Henry Grattan, on Moving for a Declaration of Irish Right on April 19, 1780, in referring to such precedents said:

> "That there are precedents against us, I allow; acts of power I would call them, not precedents; and I answer the English pleading such precedents, as they answered their Kings when they urged precedents against the liberty of England. Such things are the tyranny on one side, the weakness of the other, and the *law* of neither. We will not be bound by them; or rather, in the words of the Declaration of Right, no doing, judgment, or proceeding to the contrary shall be brought into precedent or example. Do not, then, tolerate a power, the power of the British government, over this land, which has no foundation in necessity, or utility, or empire, or the laws of England, or the laws of Ireland, or the laws of nature, or the laws of God."

It is urged here that the circumstances and facts existing in the case of petitioner at the time of his arraignment in the instant case, and where the terrible sentence was pronounced upon him for a crime to which he never voluntarily or actually pleaded guilty simply emphasizes the need for counsel. It is submitted that under all the circumstances of which this Court must judicially notice, no competent and intelligent waiver could have been executed as the petitioner at that time was neither competent nor intelligent as

far as the knowledge of his constitutional rights were concerned. To urge this Court to presume such a waiver is unreasonable, absurd, even ridiculous.

In the light of the analogy made in this point between the petitioner's and Glasser it is appropriate to quote the words of Lord Chatam in the case of Wilkes' before the House of Lords on January 8, 1770:

> "They did not say, these are the rights of the great barons, or these are the rights of the great prelates. No, my Lords, they said in the simple latin of the times, '*nullis liber homo*', and provided as carefully for the meanest subject as for the greatest. These are uncouth words, and sound but poorly in the ears of scholars; neither are they addressed to the criticism of scholars, but to the hearts of free men. These three words, '*nullis liber homo*', have a meaning which interests us all. They deserve to be remembered—they deserve to be inculcated in the minds—they are worth all the classics. Let us not, then degenerate from the glorious example of our ancestors, * * * A breach has been made in the Constitution—the battlements are dismantled—the citadel is open to the first invader—the walls totter—the Constitution is not tenable—What remains, then, but for us to stand foremost in the breach and repair it, or perish in it?"
>
> * * * * * * *
>
> "In his person, though he were the *worst* of men, I contend for the safety and security of the best. God forbid, my Lords, that there should be a power in this country of measuring the civil rights of the subject by his moral character, or by any other rule but the fixed laws of the land!"

In *Powell* v. *Alabama*, 287 U. S. 45, in a passage whose authority later decisions, even to *Rice* v. *Olsen*, *supra*, have strengthened rather than weakened, it was said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted on incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant or illiterate, of those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, * * *. It reasonably may not not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

POINT FOURTH

The adversary nature of the American Judicial Process in criminal prosecutions which has emerged from the common law requires that all persons charged with serious crimes need the assistance of counsel at all stages of the proceedings. These requirements are no more dispensable than are the services and duties of the attorney for the State and only on very rare occasions may they be waived; but never in cases under the circumstances here.

The very adversary nature of the Anglo-American judicial process make the right to the assistance of counsel of great importance to one charged with a serious crime. In it is ingrained all the elements of competitive capitalism. If it were an investigative system, the right to counsel would be

relatively insignificant and unimportant, as the court would be charged with the affirmative duty of initiating an inquiry to ascertain the facts, without and dependence on the adequacy of the presentation by the prosecutor for the state or the attorney for the defense. But the adversary system of jurisprudence which emerged from the common law and the spirit of Montesquieu (L'Esprit des lois.) is of a very different character. The very inherent nature of the process demands that one charged with crime needs counsel in the same manner and to the same extent as a sick person requires the services of a physician. Under the adversary system law is recognized as one of the learned professions with all empiricism outlawed by statute, and the idea of "every man his own lawyer has been shown by all experience to be an illusion." (Roscoe Pound, The Administration of Justice in the Modern City. 26 Harv. L. Rev. 302, 319.) A criminal trial is in essence a contest, and as in all contests, the greatest advantage rests with the party most familiar with the rules and the knowledge of the pitfalls that may be encountered, and the barricades that may be erected. The theory of the adversary system has always been that justice will emerge, but this theory is predicated on one essential ingredient: that not one, but both parties will have a working knowledge of the rules. Many a man has forfeited his liberty and property on the absence of a single word on the record: EXCEPTION.

In the field of criminal law, where the stakes in the game are the life and liberty of a human being on one hand, and the ambition of an assistant state prosecutor on the other, additional factors, which have frequently been the subject of comment by this Court, must be taken into consideration.

1. That aside from the conniving and scheming type of criminal, who in most cases is adequately defended by high-powered counsel, generally paid for by the proceeds

of his loot, most persons accused of crime are people of little intelligence or education and meager financial resources (Glueck, Criminal Careers Retrospect, 1943, 5, 6; Dwight McCarthy, Mental Defectives and the Criminal Law, 14 Iowa L. Rev. 401, 416 (1929); Stearns, Medical and Social Factors in Crime, 18 Ind. L. J. 283, 288 (1943)). They are thus at an increased disadvantage due to their lack of personal ability and of funds with which to engage competent counsel. (Based on extensive study of crime and criminals, Professor Sheldon Glueck has concluded that the furnishing of counsel to poor persons accused of crime is a crying need. Crime and Justice, 1936, 241.) No case has come before this court where an accused needed counsel more desperately than did this petitioner in the Kings County Court on June 1st, 1931.

2. Prosecuting attorneys, whose efficiency is determined by the percentage of the convictions they submit to the Legislature each year, are more interested in obtaining these convictions than in seeing that justice is done. The need for getting results puts pressure upon them to use unethical tactics and strategy and in some cases "third degree," to suppress evidence, to extort confessions, to bulldoze witnesses, and generally to indulge in that lawless enforcement of law which produces a vicious circle of contempt for law (Roscoe Pound, Criminal Justice in America, 1930, 186; Glueck, Crime and Justice, 1936, 35, 65). They have a direct personal interest in obtaining a conviction. But in no case can the petitioner discover where the interest was so personal that the court and prosecutor denied an accused counsel so that they might arbitrarily assume the responsibility to plead a penniless 19 year old infant guilty of a crime whereby he would have to endure imprisonment for a maximum term of thirty years, and as a vindication of their acts pray to this court to sustain

the contention that because petitioner had been arrested for juvenile delinquency he was adequately qualified to protect his constitutional rights without counsel. Other than this case none has yet been discovered in recent years.

3. To the poor, the unfortunate, the ignorant, the judgment of the County Court is the final end of the proceedings, but to the other category above mentioned the final judgment of the County Court is just the basis for a long line of litigation to Appellate Courts (Chief Justice Mitchell in Motions and Rules, 2nd Ed. 1906, 124).

The highest court in this nation has on many occasions commented upon the factors above outlined. It is not on conjecture that they are here presented. They only stress with greater force the vital importance of counsel to a defendant in a criminal prosecution. Unlawful and tyrannical methods of procuring convictions have been demonstrated as stark realism and it is not necessary to go back to the dark middle ages to uncover them. Deliberate deception may be practiced upon a court by the presentation of testimony known to be perjured (*Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *People of New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Herbert* v. *Louisiana*, 47 S. Ct. 103). Confessions may be introduced by state officers with the connivance of assistant district attorneys that have been extorted by fear or procured by other unlawful means (*Malinski* v. *New York*, 324 U. S. ——; *Brown* v. *Mississippi*, 297 U. S. 278; *Ashcraft* v. *Tennessee*, 64 S. Ct. 921). Pleas of guilty may be elicited by fraud and misrepresentation (*Lyons* v. *Goldstein*, 290 N. Y. 19; *Smith* v. *O'Grady*, 312 U. S. 329; *Ex Parte Sharp*, 33 F. Supp. 464; *Chambers* v. *Florida*, 309 U. S. 227; *State* v. *Paglianch*, 252 P. 177; *Rhodes* v. *State*, 156 N. E. 389). Innocent men may be the victims of "educated identifications" procurred by zealous private detectives and state

agents (*People* v. *Campbell*, Court of General Sessions, April, 1937; Convicting the Innocent, 1932, by Borchard).

It is in the recognition of these obvious truths that this court stated an accused required the "*guiding hand of counsel at every step in the proceedings against him*" (*Powell* v. *Alabama*, 287 U. S. 45). In *Smith* v. *O'Grady*, 312 U. S. 329, there has appeared from the record the "*picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him*, and inveigled by false statements of state law enforcement officers into entering a plea of guilty . . . Rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal." We have here a more aggravated set of circumstances. This petitioner was not even accorded the right to plead guilty; *he was pleaded guilty by the order of the court and the district attorney;* he had nothing to say in the matter; and he was, on that plea, sentenced to imprisonment in state prison for thirty years. These statements are not the result of mere allegations in the verified petition to this court; they are substantially consistent with the stenographic minutes of the Kings County Court taken by Mr. Ralph Roberts, the official court stenographer of June 1st, 1931. The petitioner submits that these things could not have happened had counsel been assigned; even assigned counsel could not plead him guilty (Code of Criminal Procedure, section 335). But they conclusively demonstrate the dire need for the assignment of counsel to a defendant too poor to engage his own counsel when he is charged with crime, and therefore give substance to the constitutional provisions and statutory mandates that are applicable for the requirements of the poor and ignorant as well as the rich and educated. It was in the recognition of this principle that the guarantee of the right to counsel contained in the

state and federal constitutions was to protect an accused from a conviction resulting from his own ignorance. In *Johnson* v. *Zerbst*, 304 U. S. 458, this court said:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyers—to the untrained layman—may appear complex, intricate and mysterious."

And this petitioner at the time of his arraignment was not even the average layman, he was a penniless 19 year old boy with no education or friends who might engage counsel to aid him in his terrible predicament. In *Adams* v. *United States*, 317 U. S. 269, where the defendant was a person of good education, and had previously conducted civil litigation all the way to this court, the importance of this was reasserted:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have the time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court."

These realistic truths do not become less evident because the trial takes place in a state rather than a Federal Court. The laws of the state are not less intricate; the accused is no more educated or intelligent and possesses no greater

skill; the prosecutor is no less partisan, in fact, in most cases, more partisan on account of local prejudice and a greater opportunity to exploit his efficiency in obtaining convictions; and the court is no more able, under governing rules to conduct the defense for the accused nor to make an independent inquiry to ensure that Justice is done. All these elements inherently evolve from the adversary system of jurisprudence. Mr. Earl T. Crawford of the Missouri Bar hit the matter squarely when he said:

> "Under such circumstances, where the prosecuting attorney is seeking to add another feather to his cap or to make an example of some offender, a poor ignorant person, particularly where weakly defended by an incompetent attorney, may be and often is heavily dealt with regardless of his offence. The safeguards of our criminal procedure were originally designed to protect the lowly against the great power of a royal government. And it would seem that such safeguards are as necessary today as ever; perhaps more so in order to protect our people from the ever increasing power of the state, especially so long as the attorneys for the state seek convictions for their own personal advancement and assume the position of a partisan advocate instead of simply standing between the people and the accused. The incorporation into our criminal jurisdiction of a public defender would tend to obviate the 'almighty' position now occupied by the prosecuting attorney in the minds of many." The Prosecuting Attorney's Attitude. 5. Mo. Bar. Journal 138, (1934).

See also Benjamin V. Cohen and Erwin L. Griswald in the Denial of Counsel to Indigent Defendants, New York Times, August 2, 1942, IV, 6:5. "The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under our law."

It is submitted in this consideration that the factors here discussed were elements influential in depriving the peti-

tioner of his liberty without due process of law in violation of the Constitution of the United States, and that the same or similar elements are now present in the efforts to prolong the illegal confinement of the petitioner. This court said in *Williams* v. *Kaiser*, 323 U. S. 471:

> "Only counsel could discern from the facts whether a plea of not guilty to the offence charged or a plea of guilty to a lesser offence would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. *He needs the aid of counsel lest he be the victim of overly-zealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment. "These are reasons why the right to counsel is fundamental."* Powell v. Alabama, supra; 287 U. S. at page 70, 53 S. Ct. at page 64; Grosjean v. American Press Co., 297 U. S. 233, 243, 244, 56 S. Ct. 444, 447; Avery v. Alabama, 308 U. S. 444, 447, 60 S. Ct. 321, 322. They indicate the protection which the individual needs when charged with crime. Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accomodated to the constitutional guarantees of the individual."

And the same eminent authority, Mr. Earl T. Crawford, quoting the words of Mr. Samuel Untermyer, 5 Mo. Bar Jour., also says:

> "The modern attorney does not stand between the people and the accused. He and his assistants too often measure success of their labor by the number of convictions they have secured. It is false and brutal conception of duty that is responsible for grave injustice, *but it is nonetheless true that it exists.* Under its influence, the prosecuting attorney becomes a partisan advocate, blind to the strength of the defense, unwilling to voluntarily expose the weakness of the people's case." (Emphasis petitioner's.)

It is no defense for the respondent to assert that this petitioner was guilty of the charges in the indictment. Assuming even that the petitioner knew he was guilty of a crime, he could not know whether, under the applicable statutes and court decisions, that it was robbery in the first degree, or any lesser degree, grand larceny or petty larceny. "Only counsel could discern from the facts" what the crime was. And even if the petitioner were guilty of robbery in the first degree, that could have no influence here for it is not the question that must be decided. His right to counsel must be determined not only as of that time, *but in the light of the fact that on his arraignment in the Kings County Court on June 1, 1931 he was presumed to be innocent.* The question before this court, is not whether the failure to assign counsel did petitioner any harm, but whether he has been deprived of a right or rights guaranteed him by the federal and state Constitutions, so as to render the plea of guilty ordered entered by the court against and all subsequent proceedings void. In *Glasser v. United States*, 315 U. S. 60, 75-76, this court said:

> "To determine the precise degree of prejudice sustained by Glasser as result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 136, 137, Mr. Justice Roberts, dissenting, said:

> "The respondent urges that whatever may have been the petitioner's right, the record demonstrates he could have suffered no harm by reason of his absence, * * * But if it were clear that the verdict was not affected by the knowledge gained on the view or that the result would have been the same had the appellant

been present, still the denial of his constitutional right ought not be condoned. Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question on the amount of harm done the accused, is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him."

These safeguards by Constitutional provisions and legislative enactments are placed about a defendant to be accorded him by prosecuting officers and courts, and the defendant cannot be deprived of them with impunity. In the *Snyder* case the court said at page 105:

"What may not be taken away (consistent with due process) is notice of the charge and an adequate opportunity to be heard in defense of it."

But too frequently an accused cannot have adequate opportunity to be heard in his own defense, if he is without counsel. He does not know the rules. He does not even know that he is entitled to notice of the charge; and if he received notice he cannot determine its sufficiency. Men put in years of their life in learning these things; as said before, *the law is a profession.* It is compulsory under the system of jurisprudence that exists in this nation that it remain a profession while men are governed by laws; while laws are the means by which violations are determined, while the violations themselves are the deviation of laws, the right to counsel and to the effective assistance of counsel one of the most fundamental of all the guarantees of a free people. It is urged here, under the facts and circumstances surrounding the arraignment and plea of this petitioner, that if the Constitution of New York was silent on the

proposition, and that no statute could be found on the subject, the right to "Assistance of Counsel" in a criminal prosecution of a person governed by laws would be a fundamental right, and its denial would be a lawless and palpable violation of the Fourteenth Amendment of the Constitution of the United States. This question is discussed more fully in the consideration following, point fifth. We will conclude this point with a passage by Lord Erskine, in behalf of Thomas Hardy delivered before the Court of King's Bench, November 1, 1794:

> "In times when the whole habitable earth is in a state of change and fluctuation—when deserts are starting up into civilized empires around you; and when men, no longer salves to the prejudices of particular countries, much less to the abuses of particular governments, enlist themselves, like the citizens of an enlightened world, into whatever communities their civil liberties may be best protected—it never can be for the advantage of this country to prove that the strict, unextended letter of her laws is no security to its inhabitants. On the contrary, when so dangerous a lure is every where held out to emigration, it will be found to be the wisest policy of Great Britain to set up her happy Constitution—the strict letter of her guardian laws, and the proud condition of equal freedom, which her highest and her lowest subjects ought equally to enjoy—it will be her wisest policy to set up these first of human blessings against those charms of change and novelty which the varying condition of the world is hourly displaying, and which may deeply affect the population and prosperity of our country. In times when the subordination to authority is said to be every where but little felt, it will be found to be the wisest policy of Great Britain to instill into the governed an almost superstitious reverence for the strict security of the laws; which, from their equality of principle, beget no jealousies or discontent; which, from their equal ad-

ministration, can seldom work injustice; and which, from the reverence growing out of their mildness and antiquity, acquire a stability in the habits and affections of men far beyond the force of civil obligation —whereas, severe penalties and arbitrary construction of laws intended for security, lay the foundations of alienation from every human government, and have been the cause of all the calamities that have come, and are coming upon the earth."

Point Fifth

The right to counsel, and the right to the effective assistance of counsel in a criminal prosecution as guaranteed by the Sixth Amendment is so fundamental that the due process clause in the Fourteenth must protect it against State denial. The history of jurisprudence proves beyond all reasonable doubt that without the right to counsel all the other fundamental rights of an accused are as nothing under the facts and circumstances discussed in the instant case.

1. The right to counsel and the right to the effective assistance of counsel under the circumstances here is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This court has already held that the right to counsel, and the right to the effective assistance of counsel, when counsel has been assigned, which the Sixth Amendment also guarantees, was so fundamental that it was a necessary ingredient in due process of law. In *Avery* v. *Alabama*, 308, U. S. 444, this Court said:

> "The sole question presented is whether in violation of the Fourteenth Amendment 'petitioner was denied the right to counsel, with the accustomed incidents of consultation and opportunity of preparation for trial,'

because after competent counsel was duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.

"Had petitioner been denied any representation of counsel at all, such a clear violation of the *Fourteenth Amendment's guaranty of assistance of counsel would have required reversal of his conviction.* But counsel was duly appointed for petitioner by the trial court as required by both Alabama law *and the Fourteenth Amendment.* * * * But the denial of opportunity for appointed counsel to confer, to consult with the accused and prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the *Constitutional requirement* that an accused be given the assistance of counsel. *The Constitution's guaranty of counsel* cannot be satisfied by a mere formal appointment. (Italics petitioner's)

In *Powell* v. *Alabama*, 287 U. S. 45, this Court held that the failure to make an effective appointment of counsel was a denial of due process, "whether this would be so in other criminal cases or under other circumstances, we need not now determine". The question under discussion was whether the right involved was "of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and that if a right were of such a nature it was included in the due process of law. We believe that in the foregoing points it can be conclusively held that the right to counsel is of such a nature, because without the right to counsel and the effective assistance of counsel all the other fundamental rights are as nothing. In *Powell* v. *Alabama*, at page 73 it was said:

"The United States by statute and every state in the Union by express provision of law, or by the deter-

> mination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."

The Court limited its holding at that time to the facts of that particular case, and we deem it unnecessary to again repeat the facts and circumstances of the instant case of your petitioner, but its views upon the broader question seemed conspiciously clear. The opinion in that case was written by Mr. Justice Sutherland who four years later wrote the opinion in *Grosjean* v. *American Press Company*, 297 U. S. 233, where a unanimous court said that in *Powell* v. *Alabama*:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action, *by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.*"

Then again four more years later (1940) in *Avery* v. *Alabama, supra,* it was said:

> "Consistently with the preservation of constitutional balance between State and Federal sovereignty, this court must respect and is reluctant to interfere with the States' determination of local social policy. *But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands*

that we scrupulously review the record. (Italics petitioner's)

And the statement of Mr. Justice Cardozo in *Palko* v. *Connecticut* (1937), 302 U. S. 319, that in *Powell* v. *Alabama*, the right to counsel had "*been found to be implicit in the concept of ordered liberty*" was essentially true. See John Raeburn Green, Liberty Under the Fourteenth Amendment, 1942 27 Washington University Law Quarterly, 479, 529, 530, 531. In *Johnson* v. *Zerbst, supra*, this Court said that the right to the assistance of counsel was "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." These factors of this essential requirement of due process has always been recognized, the provision was even submitted by the First Congress as one of "the essential barriers against arbitrary or unjust deprivation of human rights." In other words it has never been recognized as a mere formality but a fundamental prerogative of the most sacred character. It is the right of rights without which all other rights are as nothing because they are unknown to the average layman. The framers of the Bill of Rights and the Constitution were fully aware that the most common and most effective mechanism for persecution and for the deprivation of the First Amendment freedoms was a criminal prosecution. It has always been so, since and before the trial of Jesus. History is full of it, it proved it then and it has remained true to this date and the decisions of this Court dealing with human liberty prove conclusively that it is still fully realized (*Chambers* v. *Florida*, 309 U. S. 227). And as was said by Mr. Justice Black in *Feldman* v. *United States*, 64 S. Ct. 1082:

"The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion,

speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.

"But these men were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. They sought by these provisions to assure that no individual could be punished except according to 'due process,' by which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, *and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights.* If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished." (Italics petitioner's.)

2. The factors by which this court distinquished *Betts* v. *Brady*, 316 U. S. 455 from *Powell* v. *Alabama*, 287 U. S. 45 are totally absent in this case.

In *Powell* v. *Alabama*, it was decided where a defendant is unable to employ counsel; and incapable adequately of making his own defense because of ignorance or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. The factors that compel this assignment are appropriately outlined in this brief. But as the respondent relies on the narrow and carefully limited holding made by this court in *Betts* v. *Brady*, it is necessary to draw some analogy at this time between that case and petitioner's. On page 12 of the respondent's brief in opposition to the granting of the writ it is found:

> "If we apply the standard adopted by this court in *Betts* v. *Brady*, to the circumstances surrounding the arraignment and conviction (by his own plea of guilty) of the petitioner, there is evident, nay obvious, a striking similarity in the cases. The petitioner was no mere youth, innocent of the crime of which he was charged, ignorant of the rules of law, and bewildered by the formality of courts and court procedures."

It is interesting that the respondent inserts in the statement above "(by his own plea of guilty)" he would be more correct if he stated "by the plea of guilty arbitrary ordered by the court." That would be a statement substantiated by the records. He then goes on to prove that a previous arrest for juvenile delinquency fully qualified the petitioner in "the rules of law" and the "formality of courts and court procedure." The following comparison is what is deemed as "striking similarity in the cases."

Betts v. *Brady*	*Canizio* v. *New York*
"the accused was not helpless, but a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. * * * if, the situation had been otherwise, and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction." *Coates* v. *State*, Court of Appeals of Maryland; decided April 22, 1942.	The petitioner was a 19 year old infant, with no education, no parents, no money to employ counsel, under all the disabilities that attach to an infant under the law, had never before been convicted for any offence, was wholly unfamiliar with court procedure, was never informed of the nature of the charges against him; was never asked if he wanted to stand trial or plead not guilty, or withdraw his former plea of not guilty and plead guilty or nolle contendre, but was without his consent or consultation, pleaded guilty to the crime of robbery in the first degree.
He was sentenced to a maximum term of imprisonment of eight years.	He was sentenced to a maximum term of imprisonment of thirty years.
The Constitution and statutes of Maryland *do not* provide for the assistance of counsel under the circumstances.	The Constitution and statutes of New York *mandatorily provide* for the assistance of counsel under the circumstances and places the duty of assigning counsel on the court. (Const. N. Y. Art. 1, sec. 6; Code of Criminal Procedure, secs., 8, 188, 308, 309.)

In *Betts* v. *Brady*, the court distinguished that case from *Powell* v. *Alabama*, by the fact that in the *Bett's* case no provision of the Constitution or statutes of Maryland re-

quired the appointment of counsel, whereas in the earlier case an Alabama statute did require it. Referring to *Powell* v. *Alabama*, this court said:

> "This occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offence charged. Thus the trial was conducted in disregard of every principle of fairness and in disregard of that which was declared by the law of the State a requisite of a fair trial."

The difference of the legislative policy of the two states was relied on as the principle ground for distinguishing the two cases. Therefore, the petition in the instant case must be considered in the light of the New York statutes which is "declared by the law of the State a requisite of a fair trial." Section 188 of the New York Code of Criminal Procedure provides that:

> "When the defendant is brought before a Magistrate upon arrest either with or without warrant on a charge of having committed a crime, the Magistrate must immediately inform him of the charge against him, *and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.*"

Again the question is further reinforced by section 308 of the same Code which states in part:

> "That if an accused appear on arraignment without counsel, he must be asked if he desire counsel, and if he does, the court must assign counsel."

These statutes are not, like the statutes of Maryland, limited to any particular grade of offence, but are extended broadly to all kinds of crimes, especially infamous crimes. It will be conceded here, as in *Powell* v. *Alabama*, this court is powerless to interfere with the interpretation of state

statutes by a state court; but here, as there, this Court must take into account the legislative policy of a state in determining whether the conviction violated the due process clause of the Fourteenth Amendment. Here, as in *Powell* v. *Alabama*, and as in *Williams* v. *Kaiser*, 1945, 323 U. S. 471, the denial occurred in a state whose legislative policy mandatorily required the appointment of counsel for indigent defendants prosecuted for the offence charged. (See *People* v. *McLaughlin*, 291 N. Y. 480; *People, ex rel. Moore* v. *Hunt*, 258 App. Div. 24.) Even a cursory examination of the facts in *Betts* v. *Brady* in comparison with those of the petitioner, and an examination of the laws applicable to the two cases compel a conclusion that no similarity exists, and that the contention to the contrary made by the respondent is without merit.

3. The rule announced in *Betts* v. *Brady*, is not consistent with the American concepts of the procedural standards requisite to a fair trial by due process of law as guaranteed by the Fourteenth Amendment. That case should be re-examined.

It is urged here that, this court having established beyond all reasonable question that the First Amendment freedoms are protected against state denial, it is now imperative, in order to make their protection not subject to impairment or abridgement and to afford an equally effective protection for the fundamental rights of an accused in a criminal prosecution.

When the fundamentality of constitutional rights is under discussion, the right to counsel in a criminal trial must not be excluded, because this right is not merely one of these rights; it is the key by which they are all protected. This right is infinitely more important to an accused, in danger of losing his life or liberty, than any other freedom or right guaranteed him by the Bill of Rights. The right to

the assistance of counsel is the right that protects all the other fundamental rights from being abridged or impaired. Two years after *Powell* v. *Alabama*, the Court in *Snyder* v. *Massachusetts*, 291 U. S. 97, dealt inconclusively with another right guaranteed by the Sixth Amendment, the right of an accused to be confronted with the witnesses against him. In *Brown* v. *Mississippi*, 297 U. S. 278, it reversed a conviction which rested upon a confession extorted by brutality and violence, holding that the use of such confession was a denial of due process. Recently it reversed the conviction on the same proposition in *Malinski* v. *New York*, 324 U. S. ——, where the police department aided by the assistant district attorney extorted a confession by unlawful means. The decisions in all these cases are not far removed, if removed at all, from the privilege against self-incrimination which is guaranteed by the Fifth Amendment. It is here submitted, that all the fundamental rights of free speech, free press, fair trials, and in general that criminal trials must be conducted with fundamental fairness essential to the very concept of justice is impossible except it be recognized that the right to counsel is the paramount right by which they can be all protected.

As is pointed out by Mr. Green in Liberty Under The Fourteenth Amendment, 27 Wash. U. L. Q. 497 at page 533:

> "But the due process clause of the Fourteenth Amendment, as the Court has now established, goes beyond Madison's amendment, and the ultimate limits of liberty and due process have not yet been determined. It is now apparent that the Court is working out, laboriously and piece-meal, its own bill of rights for criminal prosecutions; for Mr. Justice Roberts' rule must inevitably become in time a code of well-defined prohibitions against state action, instead of a general requirement of a "fair trial." And it seems highly desirable that this crystallizing process should be accelerated as much as possible."

It is because of the inclusion of the foregoing rights discussed, as a part of the due process, that the case of *Betts* v. *Brady*, should be examined again and the substantially limited scope of the right to counsel as announced in that case overruled. Mr. Benjamin V. Cohen and Professor Erwin N. Griswald, in their criticism of that case concluded as follows:

> "Most American lawyers and laymen alike before the decision in *Betts* v. *Brady* would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in *Betts* v. *Brady* would not wish their decision to be used to discredit the significance of that right and the importance of its observance. "Yet at a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right of counsel to defend him. The right to counsel, for the poor as well as for the rich, is an indispensable safeguard of freedom and justice under our law." (Denial of counsel to Indigent Defendants" N. Y. Times, August 2, 1942, IV, 6, 5.)

For other adverse criticism of *Betts* v. *Brady*, see: Lusky, Minority Rights and the Public Interest, 52 Yale Law Jour. 1, 28, 30; Lashly and Rava, The Supreme Court Dissents, 28 Wash. U. L. Q. 191, 204, 205; 21 Chicago-Kent L. Rev. 107; 42 Col. L. Rev. 1205; 11 Geo. Wash. L. Rev. 354; 31 Ill. Bar Jour. 139; 27 Marquette L. Rev. 34; 16 So. Cal. L. Rev. 55; 91 Un. of Pa. L. Rev. 78; 17 Tulane L. Rev. 306.

This court has held in *Smith* v. *Allwright*, 321 U. S. 649, that:

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decisions in constitu-

tional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself."

This court should have no hesitation in applying this rule to a constitutional determination which is supported by but one decision, which violently interrupted, if not a continuity of decisions, at least a continuous current of thought to the contrary, expressed and re-expressed by the court on various occasions. *Powell* v. *Alabama*, gave the right to counsel more vitality than it ever had had before, because the right to counsel as guaranteed by the Sixth Amendment is so fundamental that the due process clause must protect it against state denial. This is so because the protection against state denial which has been given to the First Amendment freedoms by their inclusion within the due process clause is incomplete and will be ineffective unless the right to counsel by an accused, and the right to affective assistance of counsel are also protected against state denial.

Because of the foregoing the case of *Betts* v. *Brady* should be overruled as it does not conform with the concepts of American justice.

Conclusion

The order of the Kings County Court should be reversed, and the judgment of conviction rendered against petitioner

of June 19, 1931, ordered vacated and expunged from the records of the Kings County Court.

Respectfully submitted,

FRANK CANIZIO,
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Dated October 27, 1945.

MAURICE EDELBAUM,
Counsel for Petitioner.

APPENDIX

Constitution of the United States

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of Counsel for his defense.

Fourteenth Amendment (In part)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

Article One

Section 6. No person shall be held to answer for a capital or otherwise infamous crime, * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and to be confronted with the witnesses against him * * *.

No person shall be deprived of life, liberty or property without due process of law.

Section 14. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.

New York Code of Criminal Procedure

Section 188. Magistrate to Inform Defendant of the Charge and His Right to Counsel.

When the defendant is brought before a Magistrate upon arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

Section 308. Defendant Appearing for Arraignment Without Counsel to be Informed of His Right to Counsel.

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. * * *

Magna Charta

Section 39. No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or in any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

Section 40. To none will we sell, to none will we deny, or delay right or justice.

Section 45. We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it.